

From: Roy Froemming [mailto:froemming@mainstreetjustice.com]

Sent: Thursday, June 07, 2012 10:10 AM

To: 'victor.schultz@micorp.com'; 'Doug Barnes'; 'Wiensch, Adam J.'; 'AECanellos@aol.com'; 'Priebe, Catherine M.'; 'c.olson@els-law.com'; 'Govan, J. Gardner'; 'lheiner@boardmanlawfirm.com'; 'mchamberlain@trustpointinc.com'; 'Shiller, Mark'; 'peter.m.wolters@jpmorgan.com'; 'Halley, Philip J. PJH (5426)'; 'royfroemming@froemminglaw.com'; 'rsn'; 'steve.r.white@jpmorgan.com'; 'susan.collins@micorp.com'

Subject: RE: UTC Update -Article IV--§ 701.0410(3)

In the response-to-drafter's-comments for Article IV, there is a reference under the comment to § 701.0410(3) to "suggested language of Roy and Angela." I am not sure whether our suggested language has been circulated to the whole committee, but here it is:

Regarding § 701.0410(3), Angela and I are concerned about the impact of the phrase "or by any other statute or legal or equitable doctrine" in the first sentence. Specifically, this could make it impossible for a beneficiary to bring an action for abuse of discretion where, e.g., a trustee of a supplemental needs trust is refusing to make any distributions, even though the beneficiary has needs and wants and the trust is adequately funded to meet future needs. It also seems odd to put the phrase in the middle of this provision, but to fail to cover the issue in Subch. 10 on breach of trust.

Also, in line with the revision to the definition of "trust for a disabled individual," the issue in the last sentence should be phrased in terms of whether assets of the trust are countable for purposes of Medicaid, not whether the person is currently eligible, or threatened with ineligibility.

Recommendation:

We suggest the following modification to § 701.0410(3):

A trustee may not be compelled by a modification or termination under this section, or under ss. 701.0411 to 701.0416, ~~or by any other statute or legal or equitable doctrine~~ to make distributions to or for any beneficiary of a trust for a disabled individual or to terminate the trust, during the lifetime of such disabled individual. A court may modify the terms of a trust for a disabled individual with retroactive effect or reform the terms of such trust to achieve the settlor's objective or, if because of circumstances not anticipated by the settlor, to otherwise further the purposes of the trust so that it does not result in the assets of the trust, property being countable as resources or income of the disabled individual's ineligibility for purposes of public assistance. ** governmental program*

If we want to restrict the power of a court to act under § 701.1001 to compel distributions from a trust for a disabled individual, it would be better to put the restriction in 1001. (Angela and I are still trying to decide whether a provision in 1001 is needed, and, if so, what it should say.)

SSI, SFP, M.A., SSI

Roy

Roy Froemming

Froemming Law Office

Address: 354 W. Main St., Madison, WI 53703

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Friday, July 12, 2013 5:45 PM
To: Knepp, Fern; Wiensch, Adam J.
Subject: RE: Definition of trust instrument

Your definition will probably work. I searched Wisconsin statutes and there are 22 pages of references to trust, some of which may fall under the scope of the Code. For example, there are:

Auction company trusts, burial and preneed trusts, cemetery trusts, attorney trust accounts, veteran trust funds, Wisconsin outdoor wildlife heritage trust fund, State Historical Society trust, insurance trusts, environmental trusts, construction company trusts, public employee trust funds, medical assistance trust fund, etc.

I am not sure that our definition of trust instrument needs to reference the statutory trusts.

Adam, does Fern's definition have your approval:

"Trust instrument" means an instrument, including any amendments or modifications to the instrument under s. 701.0111 or subch. IV, that is executed by the settlor that contains terms of a trust or is created under a judgment, decree, or order issued by a court under which property is transferred to a trustee to be administered for the benefit of a beneficiary.

If we use this definition, can we take court order out of our definition of directing party and trust protector?

Victor J. Schultz | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 | Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265 email: victor.schultz@bmo.com

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>
To: Victor Schultz/MICorporation,
Date: 07/12/2013 03:41 PM
Subject: RE: Definition of trust instrument

I think it would be better if the definition indicates who creates an instrument that is created under a statute, judgment, or decree. I assumed trust instruments created under a judgment or decree would be created by a court. However, it is not clear who creates the trust instrument under a statute. I believe the language in s. 701.0102 and 701.0401 is UTC language. Under current Wisconsin law, are there trusts are created pursuant to a statute that do not require a court judgment, decree, or order? If so, who creates that type of a trust? The following does not include a trust instrument that is created under a statute that do not require a court order, judgment, or decree:

"Trust instrument" means an instrument, including any amendments or modifications to the instrument under s. 701.0111 or subch. IV, that is executed by the settlor that contains terms of a trust or is created under a judgment, decree, or order issued by a court under which property is transferred to a trustee to be administered for the benefit of a beneficiary.

I am not sure what your answer is

Telephone call 7-17 go back to Victor's page
are these exempted in 701.0102?
statute
pub if in

change to 808 + 818

From: victor.schultz@bmo.com [<mailto:victor.schultz@bmo.com>]
Sent: Friday, July 12, 2013 2:09 PM
To: Knepp, Fern
Subject: RE: Definition of trust instrument

Your comment is helpful. After looking at 701.0102 and 701.0401, I suggest the following. What do you think?

"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created pursuant to a statute, judgment or decree that orders property to be transferred to a trustee to be administered for the benefit of a beneficiary, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV."

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>
To: Victor Schultz/MI Corporation,
Date: 07/12/2013 12:08 PM
Subject: RE: Definition of trust instrument

The proposed language states that an instrument created by an order of the court, including any amendments or modifications, is a trust instrument. This is very broad and somewhat circular. Under the proposed definition, the only thing distinguishing a "trust instrument" from an "instrument" is that a trust instrument is issued by an order of the court. Is it your intent that any "instrument" (an undefined term) created by a court is a trust instrument? If not, I recommend narrowing this part of the definition by including a description of the instrument created by the court. For example, a trust instrument means "an instrument created by an order of the court that..."

From: victor.schultz@bmo.com [<mailto:victor.schultz@bmo.com>]
Sent: Friday, July 12, 2013 11:46 AM
To: Knepp, Fern
Subject: Fw: Definition of trust instrument

Do you think this would work for our definition of trust instrument. Do you have any specific suggestions on how to word this?

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----- Forwarded by Victor Schultz/MICorporation on 07/12/2013 11:43 AM -----

From: Victor Schultz/MICorporation
To: "Wiensch, Adam J." <awiensch@foley.com>,
Date: 07/11/2013 01:41 PM
Subject: Definition of trust instrument

What do you think?

"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created by an order of the court, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV.

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Knepp, Fern

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Sent: Friday, July 12, 2013 2:09 PM
To: Knepp, Fern
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"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created pursuant to a statute, judgment or decree that orders property to be transferred to a trustee to be administered for the benefit of a beneficiary, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV."

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To: Victor Schultz/MICorporation,
Date: 07/12/2013 12:08 PM
Subject: RE: Definition of trust instrument

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Sent: Friday, July 12, 2013 11:46 AM
To: Knepp, Fern
Subject: Fw: Definition of trust instrument

Do you think this would work for our definition of trust instrument. Do you have any specific suggestions on how to word this?

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From: Victor Schultz/MICorporation
To: "Wiensch, Adam J." <awiensch@foley.com>,
Date: 07/11/2013 01:41 PM
Subject: Definition of trust instrument

What do you think?

"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created by an order of the court, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV.

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Friday, July 19, 2013 4:08 PM
To: Knepp, Fern
Subject: RE: UTC study group meeting - Thursday, July 18 at 11AM

Fern - I spoke to Adam. He believes the proposed subsection with a ? is not necessary since this essentially says that the trust instrument can override the provisions of this statute. I agree - we have decided not to add language that essentially says "except as otherwise provided in the trust instrument".

Please proceed to submit this to editing as revised below without subsection (?).

I will work on the LRB analysis and aim to give you recommended language by the end of next week.

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>
To: Victor Schultz/MICorporation,
Date: 07/19/2013 09:50 AM
Subject: RE: UTC study group meeting - Thursday, July 18 at 11AM

Looks fine to me. I will include this language in the /P3 version unless I hear otherwise.

From: victor.schultz@bmo.com [<mailto:victor.schultz@bmo.com>]
Sent: Thursday, July 18, 2013 1:52 PM
To: awiensch@foley.com
Cc: Knepp, Fern
Subject: RE: UTC study group meeting - Thursday, July 18 at 11AM

Adam, per my voicemail, please give me a call or send me an email to finalize the language in s. 701.0411.

Although I think we may have had a consensus to revise (1) to permit modification or termination by consent of the settlor and qualified beneficiaries with notice to and the right to object by all beneficiaries, we decided to leave s. 701.0411 as originally drafted with the possibility of modifying this when we get draft #4. We did not have a chance to discuss some of my other proposed changes to this statute. Adam, please review and comment on the following changes shown in red and strikethrough.

Fern, please advise if you have any issues with the statute as revised.

701.0411 Modification or termination of noncharitable irrevocable

trust by consent. (1) A noncharitable irrevocable trust may be modified or terminated, with or without court approval, upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or

termination may be exercised by a representative under s. 701.0303 only if the representative has been specifically authorized to consent to a trust's modification or termination under a power of attorney, the terms of the trust, or by the court pursuant to a guardianship or conservatorship. ~~any of the following:~~

~~(a) By an agent of the settlor under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.~~

~~(b) By the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized.~~

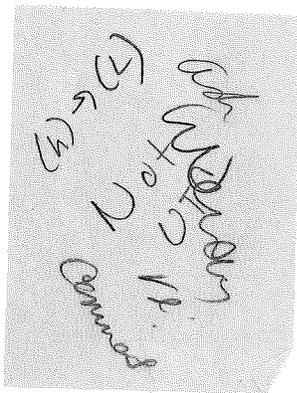
~~(c) By the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized and a guardian has not been appointed.~~

(2) (a) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

~~(?) A noncharitable irrevocable trust may be modified or terminated without consent by a trustee or trust protector if the trust instrument grants the trustee or trust protector a power to modify or terminate the trust. [This is similar to MI and WY law.]~~

(3) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.



(4) A court may not compel a beneficiary to consent to a modification or termination to satisfy a creditor of the beneficiary.

(5) Upon termination of a trust under sub. (1) or (2), the trustee shall distribute the trust property as agreed by the beneficiaries.

(6) If not all of the beneficiaries consent to a proposed modification or termination of the trust under sub. (1) or (2), the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a beneficiary who does not consent will be adequately protected.

(7) Any party proposing to modify or terminate a trust under subs. (1) or (2) ~~The trustee shall~~ give notice of the proposed modification or termination ~~a proceeding under this section~~ to the settlor,

~~if living and not under incapacity,~~ the trustee, each ~~any~~ trust protector, each ~~and any~~ directing party and each beneficiary. The notice shall be sent at least thirty (30) days before the proposed effective date of the proposed modification or termination.

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From: "awiensch@foley.com" <awiensch@foley.com>
To: "awiensch@foley.com" <awiensch@foley.com>, Victor Schultz/MI Corporation, "Hailey, Philip J. PJH (5426)" <PHALLEY@whdlaw.com>, "AECanellos@aol.com" <AECanellos@aol.com>, "Priebe, Catherine M." <cpriebe@dkattorneys.com>, "c.olson@els-law.com" <c.olson@els-law.com>, 'Doug Barnes' <dbarnes@mhtc.net>, 'jgovan' <jgovan@gklaw.com>, "lheiner@boardmanlawfirm.com" <lheiner@boardmanlawfirm.com>, 'Mark Chamberlain' <mchamberlain@trustpointinc.com>, "Shiller, Mark" <MShiller@gklaw.com>, "peter.m.wolters@jpmorgan.com" <peter.m.wolters@jpmorgan.com>, "royfroemming@froemminglaw.com" <royfroemming@froemminglaw.com>, 'rsn' <rsn@wbb-law.com>, 'Steve White' <steverwhite@sbcglobal.net>, "Collins, Susan" <Susan.Collins@associatedbank.com>,
Date: 07/18/2013 11:34 AM
Subject: RE: UTC study group meeting - Thursday, July 18 at 11AM

701.0411 Modification or termination of noncharitable irrevocable

trust by consent. (1) A noncharitable irrevocable trust may be modified or terminated, with or without court approval, upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by any of the following:

- (a) By an agent of the settlor under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.
- (b) By the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized.
- (c) By the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized and a guardian has not been appointed.

(2) (a) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(3) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

(4) A court may not compel a beneficiary to consent to a modification or termination to satisfy a creditor of the beneficiary.

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2013 – 2014 Legislature – 43 – LRB-0010/P2

FFK&TKK:jld:rs

SECTION 46

(5) Upon termination of a trust under sub. (1) or (2), the trustee shall distribute the trust property as agreed by the beneficiaries.

(6) If not all of the beneficiaries consent to a proposed modification or termination of the trust under sub. (1) or (2), the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

(a) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.

(b) The interests of a beneficiary who does not consent will be adequately protected.

(7) The trustee shall give notice of a proceeding under this section to the settlor, if living and not under incapacity, any trust protector, and any directing party.

Adam J. Wiensch
:FOLEY

Foley & Lardner LLP
777 E. Wisconsin Avenue
Milwaukee, WI 53202
Direct Dial: 414-297-5785
Cell: 414-840-3270
Fax: 414-297-4900
awiensch@foley.com

From: Wiensch, Adam J.

Sent: Thursday, July 18, 2013 11:16 AM

To: 'victor.schultz@bmo.com'; Halley, Philip J. PJH (5426); 'AECanellos@aol.com'; 'Priebe, Catherine M.'; 'c.olson@els-law.com'; 'Doug Barnes'; jgovan; 'lheiner@boardmanlawfirm.com'; 'Mark Chamberlain'; 'Shiller, Mark'; 'peter.m.wolters@jpmorgan.com'; 'royfroemming@froemminglaw.com'; rsn; 'Steve White'; Collins, Susan

Subject: RE: UTC study group meeting - Thursday, July 18 at 11AM

(19) “Qualified beneficiary” means a beneficiary who, on the date on which the

beneficiary’s qualification is determined, satisfies any of the following:

(a) Is a distributee or permissible distributee of trust income or principal.

(b) Without considering the existence or exercise of a power of appointment,

would be a distributee or permissible distributee of trust income or principal if the

interests of the distributees described in par. (a) terminated on that date without

causing the trust to terminate.

(c) Without considering the existence or exercise of a power of appointment,

would be a distributee or permissible distributee of trust income or principal if the

trust terminated on that date.

Adam J. Wiensch
:FOLEY

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777 E. Wisconsin Avenue
Milwaukee, WI 53202
Direct Dial: 414-297-5785

Cell: 414-840-3270
Fax: 414-297-4900
awiensch@foley.com

From: victor.schultz@bmo.com [<mailto:victor.schultz@bmo.com>]
Sent: Wednesday, July 17, 2013 4:42 PM
To: Halley, Philip J. PJH (5426); 'AECanellos@aol.com'; Wiensch, Adam J.; 'Priebe, Catherine M.'; 'c.olson@els-law.com'; 'Doug Barnes'; jgovan; 'lheiner@boardmanlawfirm.com'; 'Mark Chamberlain'; 'Shiller, Mark'; 'peter.m.wolters@jpmorgan.com'; 'royfroemming@froemminglaw.com'; rsn; 'Steve White'; Collins, Susan
Subject: Re: UTC study group meeting - Thursday, July 18 at 11AM

Here is the call in information for our telephone conference tomorrow:

Phone number 1-866-389-7962
Access Code 4996727

Our agenda is:

1. Status update of LRB draft #4
2. Confirm language to be proposed for section 701.0411

I am expecting Phil, Christina, Liz, Mark Chamberlain by proxy, and Peter to participate in the meeting. Gardner cannot participate, but I have talked to him and understand his position on 701.0411. I did not hear from Angela, Adam, Cathy, Doug Barnes, Mark Shiller, Roy, Randy or Steve so I am not sure if they will be calling in.

The issue to be discussed is whether to permit modification or termination of a trust by less than all of the beneficiaries. The proposal is to exclude consent by remote contingent beneficiaries, but require notice to all beneficiaries. Of the 26 UTC jurisdictions, 22 either require court approval or consent by all beneficiaries. Four states - TN, MI, WY and KS require consent by the qualified beneficiaries. The attached PDF includes those state statutes and UTC section 411 plus comments.

Here is the language that I propose we consider. I think it has Gardner's approval - he recommends consent by the qualified beneficiaries and notice with the right to object to all beneficiaries.

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To: Victor Schultz/MICorporation,
Date: 07/17/2013 03:44 PM
Subject: Scanned document from sharescan@Micorp.com

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UNIFORM TRUST CODE COMMITTEE

PROPOSED FINAL COMMENTS ON SUBCHAPTER VIII, Section 701.0818 (SECTION 101): LRB DRAFT #3

701.0818 Trust protectors.

(1) **APPOINTMENT.** A trust instrument may provide for the appointment of a trust protector, whether referred to as a trust protector, another title, or no title. A trust protector has the powers granted to the trust protector in the trust instrument.

can't be the actor

(2) **LEGAL CAPACITY AND DUTIES.**

(a) A trust instrument ~~may specify whether a particular power granted to a trust protector is exercisable in a fiduciary or nonfiduciary capacity and whether a power exercisable in a nonfiduciary capacity must be exercised in good faith.~~

settlor or a court

(b) If a power is exercisable in a fiduciary capacity, the trust protector shall act in good faith and shall exercise the power in a manner that is consistent with the terms and purposes of the trust instrument and the interests of the beneficiaries.

(c) If a power is exercisable in a nonfiduciary capacity, the trust protector shall act in good faith unless the trust instrument provides otherwise.

(d) A trust protector does not have a duty to exercise its powers, to monitor the conduct of the trustee or any directing party, or to monitor changes in the law or circumstances of the beneficiaries.

(3) **LIABILITY.** A trust protector is liable for any loss that results from breach of the trust protector's duties, except as follows:

(a) If the trust protector is also the settlor, the trust protector is not liable for any loss that results from a breach of the trust protector's duties.

(b) If the trust protector is also a qualified beneficiary, the trust protector is not liable for any loss that results from a breach of the trust protector's duties for a power exercised in a nonfiduciary capacity.

(4) **TRUST PROTECTOR POWERS.** If a trust instrument does not specify whether a particular power granted to a trust protector is exercisable in a fiduciary or nonfiduciary capacity:

(a) The trust protector shall exercise the following powers in a fiduciary capacity:

1. Interpret or enforce the terms of the trust at the request of the trustee.
2. Correct errors or ambiguities in the terms of the trust that might otherwise require court construction or defeat the settlor's intent.
3. Review and approve the trustee's reports or accounting.
4. Resolve disputes between the trustee or a directing party and a beneficiary.
5. Consent to or veto distributions to a beneficiary.
6. Consent to or veto investment actions.

(b) The trust protector shall exercise any other power in a nonfiduciary capacity. These powers may include the power to:

1. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property, or the administration of the trust.
2. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal or state law.
3. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust.
4. Eliminate or modify the interests of a beneficiary, add a new beneficiary or class of beneficiaries, or select a beneficiary from an indefinite class.
5. Modify the terms of a power of appointment granted under the trust.
6. Remove, replace, or appoint a trustee, trust protector, or directing party or a successor trustee, trust protector or directing party.
7. Terminate the trust.
8. Appoint assets to a new trust under s. 701.0418.
9. Advise the trustee on matters concerning a beneficiary, including whether to provide information to a beneficiary pursuant to s. 701.0813.

(c) Notwithstanding sub. (a) and (b) and any provision in the trust instrument to the contrary, a trust protector who is also serving as the trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity.

(d) Notwithstanding sub. (a) through (c), a trust protector who is also the settlor may exercise any power in the trust protector's personal interests and a trust protector who is also a qualified beneficiary may exercise any power that is exercisable in a nonfiduciary capacity in the trust protector's personal interests.

(5) RESIGNATION AND RELEASE OF POWERS. A trust protector may resign or release any power granted to the trust protector by giving written notice to the trustee and to any successor trust protector.

(6) PROHIBITED ACTIONS. A trust protector may not exercise a power granted to the trust protector to do any of the following:

(a) Create or expand any beneficial interest, power of appointment, right of withdrawal, or right to receive trust property as a result of the exercise of a power of appointment if the creation or exercise would favor the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate.

(b) Modify or amend a trust in order to do any of the following:

1. Remove a requirement pursuant to 42 USC 1396p (d) (4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of the income beneficiary of any of the following:

a. A trust for which a marital deduction has been taken for federal income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A grantor retained annuity trust under section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) of the Internal Revenue Code is currently in place.

(c) Modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused such trust not to qualify for the deduction.

(7) SETTLOR RIGHTS. A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives, and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust protector and may do so regardless of whether the settlor is deceased.

(8) DUTIES OF A TRUSTEE AND A DIRECTING PARTY.

(a) A trustee and a directing party shall act in accordance with a trust protector's exercise of a power granted to the trust protector, and shall not be liable for so acting, unless the attempted exercise is manifestly contrary to the power granted to the trust protector or the trustee or the directing party knows that the attempted exercise would constitute a serious breach of a duty that the trust protector owes to the beneficiaries of the trust.

(b) A trustee and a directing party do not have a duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner in which the trust protector exercised its discretion.

(9) RIGHT TO INFORMATION. A trust protector may request information about the trust from the trustee and, if such information is related to the power granted to the trust protector, the trustee shall provide the requested information to the trust protector. Except as otherwise provided in this chapter, a trustee does not have an obligation to provide any information to the trust protector that the trust protector does not request. If a trustee is bound by any confidentiality restrictions with respect to information requested by a trust protector, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector. A trustee is not liable to any beneficiary for any loss or damages resulting from the trustee providing information to the trust protector that is related to the power granted to the trust protector.

(10) PAYMENT OR REIMBURSEMENT OF ATTORNEY FEES AND COSTS. A trustee, in accordance with s. 701.1004, shall pay attorney fees and costs or reimburse a trust protector for attorney fees and costs to defend any claim made against the trust protector.

(11) APPLICATION OF OTHER SECTIONS TO TRUST PROTECTORS. Sections 701.0701, 701.0708, 701.0709, 701.1001, 701.1002, 701.1003, 701.1005, 701.1006, 701.1007, 701.1008, 701.1009, and 701.1010 apply to a trust protector as if the trust protector is the trustee.

(12) JURISDICTION. A person who accepts an appointment as a trust protector of a trust having its principal place of administration in this state submits to the jurisdiction of the courts of this state, as provided in s. 701.0202 (1), with respect to matters involving the trust.

Knepp, Fern

To: victor.schultz@bmo.com
Subject: RE: Definition of trust instrument

"Trust instrument" means an instrument, including any amendments or modifications to the instrument under s. 701.0111 or subch. IV, that is executed by the settlor that contains terms of a trust or is created under a judgment, decree, or order issued by a court under which property is transferred to a trustee to be administered for the benefit of a beneficiary.

From: victor.schultz@bmo.com [mailto:victor.schultz@bmo.com]
Sent: Friday, July 12, 2013 2:09 PM
To: Knepp, Fern
Subject: RE: Definition of trust instrument

Your comment is helpful. After looking at 701.0102 and 701.0401, I suggest the following. What do you think?

"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created pursuant to a statute, judgment or decree that orders property to be transferred to a trustee to be administered for the benefit of a beneficiary, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV."

Victor J. Schultz | Vice President | Estate Planning Specialist - Financial Planning Strategy | BMO Harris Bank N.A. | 111 East Kilbourn Avenue, Suite 200 | Milwaukee, Wisconsin 53202 |
Phone (414) 287-7019 / Cell (262) 844-8756 / Toll free 800-342-2265
email: victor.schultz@bmo.com

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From: "Knepp, Fern" <Fern.Knepp@legis.wisconsin.gov>
To: Victor Schultz/MICorporation,
Date: 07/12/2013 12:08 PM
Subject: RE: Definition of trust instrument

The proposed language states that an instrument created by an order of the court, including any amendments or modifications, is a trust instrument. This is very broad and somewhat circular. Under the proposed definition, the only thing distinguishing a "trust instrument" from an "instrument" is that a trust instrument is issued by an order of the court. Is it your intent that any "instrument" (an undefined term) created by a court is a trust instrument? If not, I recommend narrowing this part of the definition by including a description of the instrument created by the court. For example, a trust instrument means "an instrument created by an order of the court that..."

From: victor.schultz@bmo.com [mailto:victor.schultz@bmo.com]
Sent: Friday, July 12, 2013 11:46 AM
To: Knepp, Fern

Subject: Fw: Definition of trust instrument

Do you think this would work for our definition of trust instrument. Do you have any specific suggestions on how to word this?

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----- Forwarded by Victor Schultz/MICorporation on 07/12/2013 11:43 AM -----

From: Victor Schultz/MICorporation
To: "Wiensch, Adam J." <awiensch@foley.com>,
Date: 07/11/2013 01:41 PM
Subject: Definition of trust instrument

What do you think?

"Trust instrument" means (a) an instrument executed by the settlor that contains terms of a trust, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV; or (b) an instrument created by an order of the court, including any amendments thereto or modifications thereto under s. 701.0111 or subch. IV.

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Knepp, Fern

From: victor.schultz@bmo.com
Sent: Friday, June 21, 2013 3:53 PM
To: Knepp, Fern
Cc: Wiensch, Adam J.; Priebe, Catherine M.; Collins, Susan; Shiller, Mark
Subject: Re: Wisconsin Trust Code - section 701.0818
Attachments: UTC article 8 - section 701.0818 - comments on third draft WBA - clean copy.docx

Hi Fern - as a result of the numerous comments to this section and as a result of our new proposed definition of trust protector, we have completely revised s. 701.0818, Here is our revised section. I will call you next Tuesday to see if you have any questions or need an explanation of our changes.

Section 701.0418 will follow in a separate email..

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S. 701.0818 Trust Protectors.

(1) Appointment. A settlor or a court may provide for the appointment of a trust protector in a trust instrument, whether referred to as a trust protector, another title, or no title. A trust protector has the powers granted to the trust protector in the trust instrument.

(2) Trust protector powers; legal capacity. (a) A settlor or a court may specify in a trust instrument that a particular power granted to a trust protector is exercisable in a fiduciary or nonfiduciary capacity and whether a power granted to the trust protector in a nonfiduciary capacity is required to be exercised in good faith.

(b) If a settlor or the court does not specify in a trust instrument that a particular power granted to a trust protector is exercisable in a fiduciary or nonfiduciary capacity, all of the following apply:

1. The trust protector shall exercise the power in a fiduciary capacity if it is a power to do any of the following:

- a. Interpret or enforce the terms of the trust at the request of the trustee.
- b. Correct errors or ambiguities in the terms of the trust that might otherwise require court construction or defeat the settlor's intent.

[Query: Can subs. a. and b. be exercised in the interests of the beneficiaries or do we need to move these powers to the nonfiduciary power capacity list? I am not sure about a., but I think b. might need to be moved because a decision in accordance with the settlor's intent might not be in the interest of some of the beneficiaries.]

- c. Review and approve the trustee's reports or accounting.
- d. Resolve disputes between the trustee or a directing party and a beneficiary.
- e. Consent to or veto distributions to a beneficiary.
- f. Consent to or veto investment actions.

2. If the power is not a power described in subd. 1.a. to 1. f., the trust protector shall exercise the power in a nonfiduciary capacity, including the power to do all of the following:

- a. Modify or amend the trust instrument to respond to opportunities related to, or changes in, restraints on alienation or other state laws restricting the terms of a trust, the distribution of trust property, or the administration of the trust.

For Victor

Move b. but not a.



- b. Modify or amend the trust instrument to achieve a different tax status or to respond to changes in federal or state law.
- c. Change the principal place of administration, the tax situs of the trust, or the governing law of the trust.
- d. Eliminate or modify the interests of a beneficiary, add a new beneficiary or class of beneficiaries, or select a beneficiary from an indefinite class.
- e. Modify the terms of a power of appointment granted under the trust.
- f. Remove, replace, or appoint a trustee, trust protector, directing party, or a successor trustee, trust protector, or directing party.
- g. Terminate the trust.
- h. Appoint assets to a new trust under s. 701.0418.
- i. Advise the trustee on matters concerning a beneficiary, including whether to provide information to a beneficiary under s. 701.0813.

3. Notwithstanding subd 2, and any provision in the trust instrument to the contrary, a trust protector who is also serving as the trustee or a directing party shall exercise any power granted to the trust protector in a fiduciary capacity.

3A. Notwithstanding subs. 1. to 3., a trust protector who is also the settlor may exercise any power in the trust protector's personal interests.

4 5. Notwithstanding subs. 1 to 3., a trust protector who is also a qualified beneficiary may exercise any power that is exercisable in a nonfiduciary capacity in the trust protector's personal interests.

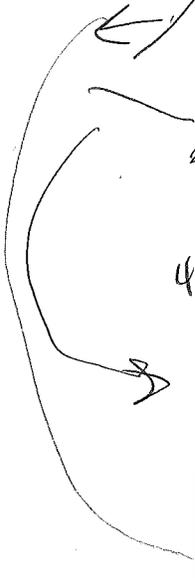
****Note: I removed "any provision in the trust to the contrary" because this subdivision only applies if the trust is silent with regard to the power. Is it consistent with your intent that subs. 3 to 5. only apply when the trust instrument is silent as to a particular power?

Response: No, we intend for subd. 3 to apply even if the trust instrument addresses the issue.

(3) Trust protector powers; duties. (a) If a power granted to a trust protector is exercisable in a fiduciary capacity, the trust protector shall act in good faith and shall exercise the power in a manner that is consistent with the terms and purposes of the trust instrument and the interests of the beneficiaries.

(b) If a power granted to a trust protector is exercisable in a nonfiduciary capacity, the trust protector shall act in good faith unless the trust instrument provides otherwise.

Mandatory



(c) A trust protector does not have a duty to exercise its powers, to monitor the conduct of the trustee or any directing party, or to monitor changes in the law or circumstances of the beneficiaries.

(4) Liability. A trust protector is liable for any loss that results from a breach of the trust protector's duties, except as follows:

(a) If the trust protector is also the settlor, the trust protector is not liable for any loss that results from a breach of the trust protector's duties.

(b) If the trust protector is also a qualified beneficiary, the trust protector is not liable for any loss that results from a breach of the trust protector's duties for a power that is exercised in a nonfiduciary capacity.

(5) Resignation and release of powers. A trust protector may resign or release a power granted to the trust protector by giving written notice to the trustee and to any successor trust protector.

(6) Prohibited actions. A trust protector may not exercise a power granted to the trust protector to do any of the following:

(a) Except as provided in subds. (2)(b)4 and 5, cCreate or expand any beneficial interest, power of appointment, right of withdrawal, or right to receive trust property as a result of the exercise of a power of appointment if the creation or expansion would ~~favor~~benefit the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate.

(b) Modify or amend a trust to do any of the following:

1. Remove a requirement pursuant to 42 USC 1396p (d) (4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of an income beneficiary of any of the following trusts:

a. A trust for which a marital deduction has been taken for federal income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse.

**** Is this correct: A trust protector may not exercise a power granted to the trust protector to modify or amend a trust to reduce or eliminate an income interest of an income beneficiary of ... [a trust for which a marital deduction has been taken for federal

income tax purposes under section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse] Response: Yes.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A grantor retained annuity trust under section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) of the Internal Revenue Code is in place.

(c) Modify any beneficial interest of a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused the trust not to qualify for the deduction.

(7) Settlor rights. A trust protector is not subject to the direction of the settlor and the settlor may not bring a cause of action against the trust protector. A trust protector may consider a settlor's goals, objectives, and philosophies in establishing the trust and the trust's structure when exercising the powers granted to the trust protector and may do so regardless of whether the settlor is deceased.

(8) Duties of a trustee and a directing party. (a) A trustee and a directing party shall act in accordance with a trust protector's exercise of a power granted to the trust protector. A trustee and a directing party are not liable for acting in accordance with the trust protector's exercise of a power granted to the trust protector, unless the attempted exercise is manifestly contrary to the power granted to the trust protector or the trustee or the directing party knows that the attempted exercise would constitute a serious breach of a duty that the trust protector owes to the beneficiaries of the trust.

****Note: I am confused by the phrase "attempted exercise." Response: Attempted exercise refers to the direction to act by a trust protector to a trustee or directing party. The exercise of the power is only attempted if the direction is given but the trustee or directing party refuses to act (presumably because the exercise is manifestly contrary to the terms of the trust or would constitute a serious breach of duty.) You deleted the terms "manifestly" and "serious". These terms come directly from the UTC. The UTC comments explain that this language is intended to only impose minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a duty owed by the holder of the power to the beneficiaries of the trust.

(b) A trustee and a directing party do not have a duty to monitor the conduct of the trust protector, provide advice to or consult with the trust protector, or communicate with, warn, or apprise any beneficiary concerning instances in which the trustee or the directing party would or might have exercised the trustee's or the directing party's discretion in a manner different from the manner in which the trust protector exercised its discretion.

(9) Right to information. (a) A trust protector may request information about the trust from the trustee and, if the requested information is related to a power granted to the trust protector, the trustee shall provide the requested information to the trust protector. If a trustee is bound by any confidentiality restrictions with respect to information requested by a trust protector, the trustee may require that the trust protector agree to be bound by the confidentiality restrictions before delivering such information to the trust protector. A trustee is not liable to any beneficiary for any loss or damages resulting from the trustee providing information to the trust protector that is related to the power granted to the trust protector.

(b) Except as otherwise provided in this chapter, a trustee does not have to provide information to the trust protector that the trust protector does not request.

(10) Payment or reimbursement of attorney fees and costs. A trustee shall, in accordance with s. 701.1004, pay or reimburse a trust protector for attorney fees and costs to defend any claim made against the trust protector.

(11) Application of other sections to trust protectors. Sections 701.0701, 701.0708, 701.0709, 701.1001 to 701.1003, and 701.1005 to 701.1010 apply to a trust protector as if the trust protector is the trustee.

(12) Jurisdiction. A person who accepts an appointment as a trust protector of a trust submits to the jurisdiction of the courts of this state, as provided in s. 701.0202 (1), with respect to matters involving the trust.

****Note: Your last instructions added language to s. 701.0202 (1) regarding a person who continues to serve as a trust protector of a trust after the principal place of the trust is moved to this state. This language arguably only applies to a person who accepts an appointment as a trust protector of a trust having its principal place of administration in this state. A similar issue arises for directing parties in s. 701.0808 (7). To be consistent, you could remove "having its principal place of administration in this state," or add language for a person who continues to serve. Response: This change is ok, but s. 701.0808(7) needs to be changed to be consistent with this language.

* Non court procedure for (1)

UNIFORM TRUST CODE COMMITTEE

PROPOSED ADDITIONAL COMMENTS ON SUBCHAPTER IV, Section 701.0411 (SECTION 46): LRB DRAFT

#3

1. Section 701.0411; PDF pages 42 -43

We propose that this section be rewritten as follows:

701.0411 Modification or termination of noncharitable irrevocable trust by consent.

(1) Subject to sub. (6), a noncharitable irrevocable trust may be modified or terminated, with or without court approval, upon consent of the settlor and the qualified all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by a representative under s. 701.0303 only if the representative has been specifically authorized to consent to a trust's modification or termination under a power of attorney, the terms of the trust or by the court pursuant to a guardianship or conservatorship, any of the following:

(a) By an agent of the settlor under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.

(b) By the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized.

(c) By the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized and a guardian has not been appointed.

(22) (a) Subject to sub. (6), a noncharitable irrevocable trust may be terminated upon consent of the qualified all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

(b) Subject to sub. (6), a noncharitable irrevocable trust may be modified upon consent of the qualified all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(33) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

(44) A court may not compel a qualified beneficiary to consent to a modification or termination to satisfy a creditor of the qualified beneficiary.

Except as provided language in 701.0303

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for purposes of this section

the recipient has the 1072 ? w/o court approval

(55) Upon termination of a trust under sub. (24) or (32), the trustee shall distribute the trust property as agreed by the qualified the beneficiaries.

(66) The trustee shall give a notice of a proceeding under this section to the settlor, if living, each beneficiary, each trust protector and each directing party. The notice shall inform each party of their right to object to the proposed modification or termination and the requirement of the settlor, if living, and each qualified beneficiary to consent to the ~~if not all of the beneficiaries consent to a proposed modification or termination of the trust under sub. (14) or (22).~~ if any party objects or if the settlor, if living, or a qualified beneficiary fails to consent, the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

include in the notice that

trustee what if no court proceeding

Formatted: Underline

(a) If the settlor, if living, and each qualified beneficiary ~~all of the beneficiaries~~ had consented, the trust could have been modified or terminated under this section.

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(b) The interests of a beneficiary who objects or does not consent will be adequately protected.

(7) The trustee shall give notice of a proceeding under this section to the settlor, if living and not under incapacity, any trust protector, and any directing party.

The trustee shall give notice of a proposed modif or term under this section to the settlor, each benef, each tip, and each dp. The notice shall include in the notice that the recipient has the right to object to the proposed modif or term and if the recipient objects or if a qualified beneficiary fails to consent...

Tennessee

Proposed modif or term under sub (1) or (2) 30 day notice similar to 418

Substantive questions on LRB-0010/P3

1. P. 20 line 4 Trust protector definition: not sure how "under a power of appointment" fits in the definition. *including a power under s. 701.0818(3) but not including a power of appointment*
2. P. 22 line 4. Par. (g) Should this also apply to adjusting the compensation of a directing party or trust protector? S. 701.0708 in one of the sections that applies to a directing party or a trust protector as if the person was the trustee. *yes*
3. P. 22 line 7. Similarly, does this work now that s. 701.1010 applies to trust protectors and directing parties as if they are the trustee? *NO*
4. P. 23-24. Is there supposed to be a hierarchy of how to determine the principal place of administration? If not, who decides if more than one option applies? *follow up re: (c)*
5. P. 30, lines 6-11. You added the concept of a person who continues to serve as a trustee, trust protector, or directing party of a trust after the trust is moved to this state to sub. (1). Cross references to this section in ss. 701.0808 and 701.818 apply only to a person who accepts an appointment as a trust protector or directing party of a trust having its principal place of administration in this state. *Just the cross-references see s. 0808*
6. P. 44, line 7. The second sentence could arguably be interpreted to mean that the court shall only liberally apply the cy pres doctrine to situation not expressly covered under s. 701.0413. Is this consistent with your intent or would it be more accurate to simply require the court to liberally apply the cy pres doctrine. *fixed*
7. P. 45 lines 1-5, is this an exception to the general-default rule that the terms of the trust trump the statutes? *NO*
8. P. 50: I think the use of the word "impair" could be ambiguous. Is there a more specific word that would reflect your intent? What about the word "limit?" *NO, keep impair*
9. P. 52 after l. 20: Your new subdivisions 18. and 19. Do not reference of which trust.
10. P. 53 sub. (5): There are no requirements about what must be in the written notice under which the trustee appoints assets to the 2nd trust. How does a trustee appoint the assets by a written instrument? It seems like everything is in the notice. *OK*
11. P 56, sub. (6) (b): I am not sure what the new language is trying to address. I find the new language more difficult to follow. On line 18, I think it should be "or" instead of "and." Okay? *NO, "or" yes*
12. P. 69 s.701.065. I agree this is an odd place for a section about the debts of a decedent. This section really focuses on creditor's claim. What do you think about subch. V? You would need to confirm that the "for purposes of this

2nd asked
↑
(c) & (d)
↑
are definitions
for (a) & (b)

Just the
cross-references
see s. 0808

see ins.
57-22 ←

Substantive questions on LRB-0010/P3

subchapter language" in s.701.0505 (2) will work for s. 701.065, if moved into subch. V. Also, the newly created sub. (5) uses the term "living trust." I assume that you would want that to be changed to revocable trust. Correct?

OK
move
to
sub V

OK directing
rights to
information
similar to
trust protector

13. P. 82 I have some rewording of sub. (2) for your review. In sub. (3) (b), the second sentence creates a duty for the trustee. This should not be done in a list of what the trustee does not have a duty to do. Should this go in s. 701.0813?

confirm
removal
of
(3)(b)

14. P. 101-102 Does anything need to be notwithstanding? In other words, are there specific sections that allow the trustee to take these actions or have such powers?

15. P.107 We need to look at this language. It is not UTC language and is less than clear in certain places. I suggest the following for par. (c):

confirm

(c) 1. If a claim or defense based upon breach of trust is made against a trustee, directing party, or trust protector in a proceeding, a party may motion the court for an order to prohibit the trustee from paying costs or attorney fees from trust property.

*** I wasn't sure based on the current draft if you intended this to be something that the party has to do or if the party wants to prohibit the payment the party must do this? As drafted, this would just allow the party to motion the court for an order.

2. Except as provided in subd. 3., if the moving party demonstrates to the court that there is a reasonable basis for the court to find that a breach of trust occurred, the court shall enter an order prohibiting the payment of further attorney fees and costs from trust property and shall order attorney fees or costs previously paid from trust property in such proceeding to be refunded, unless the court finds good cause to allow attorney fees and costs to be paid from the trust. A trustee, directing party, or trust protector may offer evidence to rebut the evidence submitted to the court by the moving party

3. The court may defer ruling on a motion to prohibit a trustee from paying costs or attorney fees from trust property until discovery is taken by the parties.

4. An order entered under this paragraph does not limit a trustee's, directing party's, or trust protector's right to seek an order allowing the payment of some or all of the attorneys fees or costs incurred in the proceeding from trust property, including any fees required to be refunded, after the claim or defense is finally determined by the court. If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust, after the entry of an order prohibiting payment of attorney fees and costs pursuant to this paragraph, the trustee may pay costs or attorney fees incurred in the proceeding from the trust property without further court authorization.

16. P. 123 line 12: Is this what you intended for the definition of remainder beneficiary?

* p. 84 lines 20-24 discretionary "shall"

Substantive questions on LRB-0010/P3

701.1102 (9) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends who is a beneficiary under s. 701.0103 (19) (b) or (c).
and also

17. P. 151, lines 19-20. I am not sure what your latest modification is trying to accomplish. Is that you think it is clear if broken down into a list?

Analysis by the Legislative Reference Bureau

This bill replaces current law related to trusts with the Wisconsin Trust Code (Code), a modified version of the Uniform Trust Code, as last revised and amended in 2010 (UTC). The Code is primarily a set of default rules that apply to certain trusts in this state. With some exceptions, the terms of a trust may override or modify the Code's default rules. There are, however, some mandatory rules in the Code that may not be overridden or modified by the terms of a trust, including rules that govern the requirements for creating a trust, the duty of a trustee to act in good faith, the effect of a spendthrift provision, limits on exculpatory provisions, periods of limitation for commencing a judicial proceeding, and the power of the court to take certain actions. The Code also includes default rules that are not included in the UTC, including rules related to the trustee's power to appoint assets to another trust (decanting), trust protectors, directed trusts, and life insurance contracts owned by trusts.

Under this bill, the 11 articles of the UTC are created as subchapters of the Code. Two differences in the structure of the UTC and the Code are: 1) the Wisconsin Prudent Investor Act is cross-referenced in Subchapter 9 but otherwise remains outside the Code; and 2) the Wisconsin Uniform Principal and Income Act is recreated as Subchapter 11 of the Code, with the Code's miscellaneous provisions located in Subchapter 12.

The bill also revises current Chapter 702 to clarify the meaning of a general power of appointment and a special power of appointment and to clarify when a creditor can reach assets subject to a power of appointment. Current Chapter 881 has also been amended to extend the prudent investor rule to directing parties and trust protectors who have a power over the investment of a trust, and to clarify the rules relating to retention of securities received by a trustee.

The following is an overview of each subchapter of the Code.

Subchapter 1: General Provisions and Definitions

Subchapter 1 introduces ~~the a number of new terms to Chapter 701, including:~~ the following new terms:

- (a) ~~A "Qualified beneficiary" is~~ are a trust's current income and principal beneficiaries, the immediate successor income and principal beneficiaries, and the beneficiaries who take upon termination of a trust. Qualified beneficiaries are entitled to notice and accountings in certain circumstances.
- (b) "Directed trust property" is property invested or managed by a directing party and is property over which the trustee has no investment or management responsibility.
- (c) "Trust protector" is a person who is given a specified power over the trust in a capacity other than as a trustee or a directing party.

In addition to providing definitions for the Code, subchapter 1 exempts certain types of trusts from the Code, lists the mandatory rules of the Code that may not be overridden by the terms of a trust, incorporates the common law of trusts into the Code, provides procedures for determining the

governing law and for determining and transferring the principal place of administration for a trust, and provides methods for giving and waiving notice. This subchapter also provides that interested persons may enter into a nonjudicial settlement agreement to resolve disputes related to a trust to the extent that a court could approve the terms of the nonjudicial settlement agreement.

Subchapter 2: Judicial Proceedings

Subchapter 2 addresses the role of the court in administering a trust. A court may intervene in the administration of a trust to the extent that its jurisdiction is invoked by an interested person or as otherwise provided by law. However, a trust is not subject to continuing judicial supervision unless ordered by the court in response to a petition requesting supervision. Subchapter 2 thus eliminates the current requirement for court supervision of testamentary trusts. This subchapter also addresses procedural issues such as personal jurisdiction, subject jurisdiction, and venue for judicial proceedings related to trusts.

Subchapter 3: Representation

Subchapter 3 allows a person to be represented and bound by another person for certain purposes of ~~determining whether notice has been received and consent given in a transaction or proceeding relating to a trust.~~ Under the Code, notice, information, accountings, or reports given to a person who has the power to represent and bind another person have the same effect as if given to the represented person. A person may be represented by a fiduciary, a parent, or by a representative chosen by the trustee or the court. A trustee is not required to provide such information to a beneficiary if the trustee provides the information to the beneficiary's representative. This subchapter also specifically allows a minor, incapacitated, or unborn individual, or a person whose identity is not known, to be represented and legally bound by a person who has a substantially identical interest with respect to the particular question or dispute, to the extent there is no conflict of interest in that representation.

[We may want to change the heading of section 701.0303 to read "Representation by fiduciaries, parents or representative chosen by trustee". The heading to section 701.0305 may need to be changed to "Appointment of representative by court".] I agree with both changes

Subchapter 4: Creation, Validity, Modification, and Termination of a Trust

Subchapter 4 establishes the requirements for creating, modifying, and terminating a trust. Generally, a trust is created when a person transfers property to a trustee with the intent to create a trust relationship. This subchapter expands upon the common law by specifically validating trusts for animals and trusts for certain noncharitable purposes. This subchapter also recognizes oral trusts if the terms of the trust are established by clear and convincing evidence.

This subchapter provides default rules for when a trust may be modified or terminated. For example, under the Code, a noncharitable irrevocable trust may be modified or terminated without court approval with the consent of the settlor and all beneficiaries ~~[possible change pending]~~, even if the modification or termination is inconsistent with a material purpose of the trust. For purposes of

terminating a trust, the Code increases the value of what qualifies as an uneconomic trust to a value less than \$100,000, as adjusted for inflation. With notice to the qualified beneficiaries, any trust protector or directing party, and the settlor, if living, the trustee of an uneconomic trust may terminate the trust without court approval.

The Code allows a court to apply liberally the doctrine of cy pres to a charitable trust if the charitable purpose identified in the trust becomes unlawful, impracticable, impossible, or wasteful. Under the doctrine of cy pres, a court may substitute an alternative charitable purpose. The Code preserves the requirement under current law that, when applying the doctrine of cy pres, a court must consider the community needs and the settlor's charitable purposes in determining an alternative plan for disposition of the trust property.

Finally, this subchapter includes a concept not addressed in the UTC, the authority of a trustee of an irrevocable trust to appoint trust assets to the trustee of another trust (a second trust) under certain circumstances. This authority is commonly referred to as decanting. Under the Code, subject to certain requirements, a trustee who has the power to invade trust principal for the benefit of an income beneficiary may appoint trust property to a second trust, provided that the appointment does not reduce any fixed income, annuity, or unitrust interest of the beneficiary. If a trustee's power to invade trust income or principal under the first trust is limited by a standard, the second trust may not grant the trustee a broader power to invade trust income or principal. Also, if the trustee's power to invade the principal of the first trust is not limited by a standard, the beneficiaries of the second trust must do not have to include ~~be limited to some or all of the beneficiaries of the first trust~~; otherwise, the beneficiaries of both trusts must be the same. A trustee may appoint assets to a second trust with or without court approval by providing notice to the qualified beneficiaries, any trust protector or directing party, and the settlor, if living.

Subchapter 5: Creditor's Claims; Spendthrift and Discretionary Trusts

Subchapter 5 addresses the validity of a spendthrift provision and the rights of a creditor of a settlor or of a beneficiary to reach trust assets. The Code defines a spendthrift provision as a provision that restrains either or both of the voluntary or involuntary transfer of a beneficiary's interest in a trust. In general, the Code preserves current Wisconsin law related to spendthrift provisions and creditors' rights, and thus varies from the UTC. The Code limits exceptions to the spendthrift provisions to claims for child support and public support.

Under the Code, a creditor may reach the assets of a revocable trust during the lifetime of the settlor. If the trust is a self-settled irrevocable trust, a creditor may reach the maximum amount that can be distributed to or for the settlor's benefit presently or in the future.

Subchapter 5 specifies that a beneficiary's use of real or tangible property owned by a trust does not subject the property to the claims of the beneficiary's creditors. The subchapter also eliminates a distinction sometimes made under current law between trusts that give the trustee absolute discretion in making distributions and trusts that require the trustee to make distributions for purposes of support.

Under the Code, a beneficiary's interest in a trust that is subject to a trustee's discretion does not constitute an interest in property.

The Code preserves current Wisconsin law that allows a trustee to limit claims of a creditor of a settlor upon the death of a settlor by providing or publishing notice to the creditors.

Subchapter 6: Revocable Trusts

Subchapter 6 addresses revocable trusts, which the Code defines as trusts that may be revoked by a settlor without the consent of the trustee or an adverse party. Property held in a revocable trust reverts back to the settlor if the trust is revoked. The Code treats a revocable trust as a will substitute and therefore provides that the capacity required to create or modify a revocable trust is the same as the capacity required to create or modify a will. Under the Code, a trust is presumed to be revocable unless the trust instrument expressly provides that it is irrevocable. This reverses the presumption under current law but applies only to trusts created on or after the effective date of the bill.

The Code provides that while a trust is revocable, the trustee owes its duties exclusively to the settlor. Because a settlor's powers of revocation may be exercised by a properly authorized agent, or by a conservator or guardian with court approval, revocation may remain possible, even for an incapacitated settlor, until the settlor's death. When the settlor dies, the trust is no longer revocable, and the duties of the trustee shift to the beneficiaries.

The Code limits the period during which a person may challenge the validity of a revocable trust to the earlier of one year after the settlor's death or four months after the trustee sends the potential trust contestant a copy of the trust and notice of the time allowed for commencing a proceeding.

Subchapter 7: Office of Trustee

Subchapter 7 specifies default procedural rules that apply to the office of the trustee, including rules related to acceptance or declination of a trusteeship, requirements for a bond, the rights and obligations of cotrustees, vacancy and appointment of successor trustees, the resignation of a trustee, the grounds for removing a trustee, duties of a former trustee to deliver trust property, trustee compensation, and the reimbursement of trustee expenses. This subchapter also clarifies that property is properly transferred to a trust by titling the property in the name of the trustee. Trust property titled in the name of the trust is deemed to place legal title in the name of the trustee.

Subchapter 8: Duties and Powers of Trustees, Directing Parties, and Trust Protectors

Subchapter 8 sets forth the fiduciary obligations of a trustee, directing party, and trust protector, except for those fiduciary duties included in the Uniform Prudent Investor Act.

Under the Code, a trustee must administer the trust in good faith, solely in the interests of the beneficiaries, impartially, and prudently, incurring only reasonable costs and using any special skills or expertise the trustee may have. A trustee must take reasonable steps to control and protect trust property, to maintain adequate records that clearly identify separate trust interests, to enforce claims of

the trust and defend claims against the trust, to collect trust property and redress breaches of former trustees, and to exercise its discretion in good faith and in accordance with the terms of the trust. A trustee has a duty to inform and report and must provide requested trust accountings to the current beneficiaries and to the qualified beneficiaries who request an accounting.

Under the Code, a trustee may delegate certain duties and powers but must exercise reasonable care, skill and caution when selecting an agent, establishing the scope and terms of the delegation, and periodically reviewing the agent's actions. An agent who accepts a delegation of duty or power from a trustee has a duty to exercise reasonable care to comply with the terms of the delegation. A trustee who properly delegates to an agent is not liable to the beneficiaries for the agent's actions.

Subchapter 8 provides that a trustee has broad powers to achieve proper investment, management, and distribution of the trust property, and may exercise all the powers that an unmarried, competent owner would have over individually owned property. This subchapter enumerates specific powers that a trustee has absent contrary provisions in the trust instrument, and requires a trustee to make certain presumptions related to certain tax objectives. This includes an addition to the Code about presumptions concerning marital deduction transfers.

As an addition to the UTC, the Code specifically allows a settlor or the court to appoint directing parties and trust protectors.

Under the Code, a directing party is a person who is granted a power, in a capacity other than as a trustee or a trust protector, to make or to direct the trustee to make investment or distribution decisions. A directing party is a fiduciary and is obligated to act in good faith, consistent with the terms and purposes of the trust, and the interests of the beneficiaries. The trustee has no duty to monitor the directing party, and a trustee that follows a directing party's directions is not liable for any resulting losses, except for acts or omissions resulting from willful misconduct.

Under the Code, a trust protector is a person who is granted a specified power over the trust, the trustee, or the trust property in a capacity other than as a trustee or a directing party. A settlor or the court may specify whether a power granted to a trust protector must be exercised in a fiduciary or nonfiduciary capacity. If a settlor does not specify the capacity in which a trust protector is to exercise a particular power, the Code provides default rules for determining the capacity for specific powers. A trustee has no duty to monitor the trust protector, and a trustee generally is not liable for taking actions consistent with the actions of the trust protector.

Subchapter 9: Investment Management of Trusts

Subchapter 9 provides that, subject to certain exceptions, the investment management of trust property is governed by the Uniform Prudent Investor Act, which has been adopted in this state. As an exception to this general rule, a trustee who has no power over directed trust property does not have a duty to monitor the conduct or investment performance of the directing party.

The Code also limits the application of the Uniform Prudent Investor Act to life insurance trusts. If a principal purpose of a trust is to hold a life insurance contract, a trustee has no duty to determine whether the life insurance contract is, or remains, a proper investment. This provision will apply to all trusts executed after the effective date of the Code and to pre-existing trusts that provide a notice to the qualified beneficiaries.

Subchapter 10: Liability of Trustees and Rights of Persons Dealing with Trustee

Subchapter 10 identifies the remedies for breach of trust, discusses how damages are determined for a breach of trust, reaffirms the court's power to award costs and attorney fees, specifies potential defenses, and addresses trustee relations with and liability to persons other than beneficiaries. Under the Code, a trust instrument may not waive or vary the trustee's duty of good faith or exculpate the trustee for reckless indifference. The Code also provides that an exculpatory term in a trust is not enforceable if the inclusion of the term is the result of an abuse of the settlor's confidential relationship with the trustee.

Generally, under the Code, a beneficiary must commence a proceeding against a trustee for breach of trust within five years after the first to occur of the following: the termination of the trust, the termination of the beneficiary's interest, or the removal, resignation, or death of the trustee. However, the Code imposes a one-year statute of limitation for commencing such proceedings if the beneficiary received a report that adequately disclosed the existence of a potential claim.

Under the Code, a trustee is protected from liability for a loss in value of the trust property if there is no breach of trust. A trustee generally has no liability if the trustee acts in reasonable reliance on the express provisions of the trust, if the trustee exercises reasonable care but fails to ascertain unknown external facts, or if a beneficiary provides a consent, release, or ratification for the trustee's action. A trustee is also protected from personal liability on a contract entered into in a fiduciary capacity and for the contracts and torts of a partnership in which the trustee holds a general partnership interest if the other party was on notice of the fiduciary relationship.

Generally, a trustee is entitled to payment from the trust of attorney fees incurred in good faith. However, if a claim against the trustee is based on a breach of trust, the trustee must provide notice to qualified beneficiaries of the trustee's intention to pay attorney fees from the trust. Any party may seek a court order prohibiting payment of attorney fees from the trust by demonstrating to the court that there is a reasonable basis for the court to find that a breach of trust occurred.

A third party dealing with a trust is not liable for any breach of the trustee's obligations to the beneficiaries resulting from the transaction, unless the third party has knowledge of the actual breach by the trustee. In addition, a third party may rely on a certification of trust. A third party who receives a certification of trust and continues to demand a complete copy of a trust instrument may be held liable for damages if the demand is not in good faith.

Subchapter 11: The Uniform Principal and Income Act

Subchapter 11 incorporates into the Code the Uniform Principal and Income Act, which has been adopted in this state. The Code incorporates recent changes to the Uniform Principal and Income Act recommended by the Uniform Law Commissioners.

Subchapter 12: Miscellaneous

Subchapter 12 provides that the Code applies to trusts that are in existence on the effective date of the bill except as specifically provided, as well as to trusts created after the effective date of the bill. It also provides that the Code applies to a judicial proceeding concerning a trust commenced before, on, or after the effective date of the bill, unless a court determines that the application of the Code to a proceeding commenced before the effective date of the bill will substantially interfere with the effective conduct of the judicial proceedings or will prejudice the rights of the parties. The effective date of the Code is the first day of the seventh month following the date of publication.

Changes to Chapter 702

The bill revises Chapter 702 to define a general power of appointment as a power exercisable in favor of any one or more of the donee, the donee's estate, the donee's creditors, or the creditors of the donee's estate. A special power of appointment is defined as any power of appointment that is not a general power of appointment. The rights of a creditor of a person who holds a power of appointment have been clarified. A donee's creditor can reach property that is subject to a general power of appointment during a donee's life if the general power is presently exercisable. Upon the death of the donee, a creditor can reach property that is subject to a general power of appointment, whether or not the donee exercised the general power of appointment.

Changes to Chapter 881

The bill modifies Chapter 881 to define "fiduciary" to include a directing party with the power to direct the trustee's investment decisions, and to include a trust protector who has a power over the investment of the trust assets. Thus, the default rule is that directing parties and trust protectors are subject to the prudent investor rule if the directing party or trust protector has a power over the trust investments. In addition, Wisconsin law is clarified to provide that the general rule of diversification does not apply to assets collected by a fiduciary.